IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

BRIEF FOR DEFENDANT ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This action was brought under Section 5198 of the Revised Statutes of the United States, to recover an alleged charge of usurious interest, on certain overdrafts.

The amended petition filed on the 18th day of September, 1895, sets out in detail an account with the First National Bank, consisting of checks, deposits and constantly increasing over-drafts, on which it is alleged excessive interest was charged for a period of four (4) years, running from Janu-

ary, 1886, to March, 1890, which, from time to time, were merged in notes of the plaintiff to the bank, signed by himself and certain accommodation parties, all of which were finally merged into the bonds of the plaintiff under date of March 15th, 1890, which bonds were secured by a deed of trust on the lands of the plaintiff; also alleging that a foreclosure suit was commenced on these bonds, and mortgage securing them, in the District Court of Woodbury county, Iowa, on the 3d day of March, 1892, on which judgment was rendered against the plaintiff on the 23d day of December, 1893, for the sum of ninety-four thousand five hundred seventy-eight and ninety one hundredths dollars ($94,578.90), resulting in an execution sale on the 19th day of March, 1894, under which all of plaintiff's lands were sold, thereby paying the excessive interest charged. (Record pp 1 to 57).

For answer to this petition, this defendant denied that plaintiff at any time paid any usurious interest, or that any excessive or usurious interest was included in the decree of foreclosure mentioned. That plaintiff's cause of action was barred under the provisions of the statute under which he claimed relief, an further, that his cause of action had been fully determined and adjudicated in the foreclosure suit referred to. (Record, pp 57 to 60).

The cause was referred to W. G. Sears, Esq., as referee, to find the law and facts. The referee, after hearing the evidence for both plaintiff and defendant, found the following facts:

FIRST. That the defendant is a National Bank organized and doing business under the laws of the United States, and that the plaintiff was a customer and depositor of defendant's from January 1st, 1886, to March 15th, 1890, and during

said period overdrew his bank account, and became indebted to the defendant on overdrafts as alleged in the petition.

SECOND. That monthly during said period, plaintiff's account was balanced, and the interest computed on the overdrafts at the rate of ten (10) per cent. per annum, and the interest so charged was added to plaintiff's overdraft account for the next month.

THIRD. That the defendant instructed its bookkeeper to charge plaintiff interest on his overdraft at the rate of ten (10) per cent. per annum, and that defendant in computing said interest took the aggregate amount of overdraft, approximating to the nearest hundred for said month, on a basis of thirty days to the month or three hundred and sixty days to the year, and this way of computing interest on overdrafts was defendant's universal custom and the general custom of bankers in Sioux City during said period.

FOURTH. That the total interest on plaintiff's overdrafts amounted to two thousand and sixty-four dollars ($2,064.00), and the average rate of interest charged by defendant was ten and twenty-two one hundredths (10 22-100) per cent. and the total amount of interest charged in excess of ten (10) per cent. was seventy-two ($72.00) dollars.

FIFTH. There was no contract for plaintiff to pay interest on overdrafts, and the defendant did not intend to charge him more than ten (10) per cent. per annum, and that said average rate of ten and twenty-two one hundredths (10 22-100) per cent. on overdrafts arose by computing interest on a basis of thirty days to the month, or three hundred and sixty days to the year instead of three hundred and sixty-five days to the year, and by approximating the aggregate amount of overdrafts for one day to the nearest hundred, in place of

computing on the actual aggregate amount, and without any intent to avoid the laws of Iowa relating to usury.

SIXTH. That interest on plaintiff's overdraft was included in the several notes, which did not draw excessive interest, given by plaintiff prior to March 15th, 1890, to the defendant, referred to in plaintiff's petition and admitted by the defendant; and all of the indebtedness of plaintiff to defendant, arising or growing out of said bank account from January 1st, 1886, to March 15th, 1890, was evidenced by said notes, but said notes were not given in payment of said indebtedness.

SEVENTH. That the plaintiff, for the purpose of funding his indebtedness, on March 15th, 1890, executed one hundred (100) of his negotiable bonds, payable to the Union Loan & Trust Company, or bearer, for one thousand dollars ($1000) each, secured by trust deed to the Union Loan & Trust Company, trustee, on plaintiff's land in Woodbury and Plymouth counties, state of Iowa. On June 17th, 1890, he sold defendant sixty-one (61) of said bonds, amounting to sixty-one thousand dollars ($61,000.00), and gave his note to defendant for three thousand forty dollars and thirty-eight cents ($3,040.38) in full settlement and payment of his indebtedness to this defendant.

EIGHTH. In March, 1892, the Union Loan & Trust Company, as trustee for the First National Bank, this defendant, and T. J. Stone, who is president of defendant's bank, commenced an action against this plaintiff, and others, to foreclose said trust deed and bonds, and D. H. Talbot, this plaintiff, in his answer and amendments in said case set up that excessive interest had been charged on overdrafts by the First National Bank, and said interest had been included

in the notes afterwards given, and said notes were merged in the bonds in suit, and asked that an accounting be had of the amount of excessive interest charged on said overdrafts, and that the amount so found be deducted from the amount due on the bonds; and said D. H. Talbot, in support of his allegation, introduced evidence showing the amount of interest charged on said overdrafts; and in the determination of the case the court found that excessive interest on overdrafts to the amount of two thousand and sixty-four dollars ($2,064.00) had been charged the plaintiff, and ordered that said two two thousand and sixty-four dollars ($2,064.00) with interest at the rate named in the bonds, amounting to five hundred ninety-five dollars and forty-six cents ($595.46), making a total of two thousand six hundred nine dollars and forty-six cents ($2,609.46), be deducted from the amount due on the bonds, and a decree was entered in said case for the amount due on said bonds, less said sum of two thousand six hundred nine dollars and forty-six cents ($2,609.46).

NINTH. That in said cause a decree for ninety-four thousand five hundred seventy-eight dollars and ninety cents ($94,578.90) was rendered, of which forty-nine thousand seventy dollars and forty-seven cents ($49,070.47) was principal, thirty thousand nine hundred eighty-eight dollars and fifty-two cents ($30,988.52) was interest and fourteen thousand five hundred nineteen dollars and ninety-one cents ($14,519.91) was the amount paid on prior liens, taxes and interest on same by plaintiff in that action.

TENTH. That the sheriff, under an execution issued on said decree, sold March 19th, 1894, plaintiff's property, amounting to thirty-six thousand four hundred thirty-nine dollars and fifteen cents ($36,439.15); and on May 19th, 1894,

under said execution, sold property amounting to fifty thousand and sixty dollars ($50,060), and on July 2d, 1894, sold under said execution property amounting to twelve hundred dollars ($1,200), making a total of eighty-seven thousand six hundred ninety-nine dollars and fifteen cents ($87,699.15) realized from sheriff's sale of said land under said decree, and leaving a balance, including the interest to date of sale, of eleven thousand one hundred forty-one dollars and five cents ($11,141.05) unpaid on said judgment and decree, which balance, with interest, has not been paid.

ELEVENTH. That the interest on overdrafts not having been included in said decree, was not paid by the sale of plaintiff's land under said execution.

TWELFTH. That plaintiff's overdrafts, including interest thereon, was paid June 17th, 1890, more than four (4) years before the commencement of this action.

To this report the plaintiff filed exceptions, which, being submitted, the District Court of Woodbury county, Iowa, found:

"That the conclusions contained in the report of referee are correct; that the matters in this suit were adjudicated between the parties in the former action; that plaintiff's cause of action accrued June 17th, 1890, and his suit is barred by United States statutes on which this action is based, and that plaintiff's petition should be dismissed at his costs. (Record, page 131.)

From this judgment the plaintiff appealed to the Supreme Court of Iowa, the questions submitted being:

First. Whether any illegal interest had ever been paid by the plaintiff;

Second. If paid, whether his cause of action was barred by the statute of limitations; and

Third. Whether the matters involved had been previously adjudicated in the foreclosure proceeding.

After hearing, the Supreme Court of Iowa rendered its opinion and judgment, holding that the plaintiff had never in fact paid any illegal or usurious interest, and that if such interest had been paid it was paid more than two years prior to the commencement of this suit, and was, therefore, barred under the provisions of the statute, and that the matters involved had been formerly adjudicated, the essential features of the opinion of the Supreme Court of Iowa being as follows:

"We have seen that unless the plaintiff has paid the illegal interest, he is not entitled to recover it in this action. If it may be said that the delivery of the sixty-one bonds on June 17th, 1890, was a payment, this action is barred, as it was not commenced 'within two years from the time the usurious transaction occured,' having been commenced March 8th, 1895.

"The interest on overdrafts was surely not paid by the sale of the land, for, as we have seen, it was not included in the decree. As we view the case, we think the illegal charges of interest have never been paid, and, therefore, the plaintiff is not entitled to recover in this action.

"There is some dispute as to whether plaintiff set up these charges of illegal interest in the action to foreclose the trust deed so as to constitute a former adjudication.

"That he set it up, and that it was adjudicated, we have no doubt. True, it was not set up with the same fullness and elaboration as in this case. Unquestionably it is a matter

which might have been pled in that case, and under a familiar rule the plaintiff must be held to have asserted all available defenses to that action.

"Said section 5198 provides that action to recover back illegal interest paid must be commenced 'within two years from the time the usurious transactions occurred.' Now, whether or not we call the delivery of the bonds a payment, it is evident that the usurious transactions occurred on and before June 17th, 1890, and it follows that this action is barred. These questions are so largely questions of fact and rest upon familiar and undisputed principles of law that we do not find it necessary to refer to any of the many authorities cited.

"The lower court was fully warranted in affirming the findings of fact as reported by the referee. While we do not concur in the conclusions of law that the interest on overdrafts was excessive, but not illegal or usurious, and that the custom of banks to compute interest on the commercial basis of thirty days to the month is legal; still it does not follow that the judgment of the District Court is erroneous.

"It is correct, notwithstanding the charge of illegal interest, because the plaintiff has never paid that interest, but has been allowed the full benefit of the facts in the foreclosure case and because this action was not brought within two years of the time the usurious transaction occurred."

(Record pages 141-142.)

From this judgment a writ of error was allowed by the Chief Justice of the Supreme Court of Iowa on the alleged ground that "there was drawn in question and involved and specially set up and claimed by petitioner, a title, right, privilege or immunity under the statutes of the United States, to-

wit: Under sections Nos. 5197 and 5198, of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right, privilege or immunity so specially set up and claimed by your petitioner."

ARGUMENT

I.

THE RECORD PRESENTS NO FEDERAL QUESTION.

Section 5197, Revised Statutes, provides that any national banking association may charge and receive the rate of interest allowed by the laws of the state; and section 5198 provides that "taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two (2) years from the time the usurious transaction occurred."

The foundation of the plaintiff's action is, therefore, the allegation that a greater rate of interest has been paid. These words, "greater rate" refer to the preceding part of the section where it is said that "the taking, reserving or charging a rate of interest greater than is allowed by the preceding section." The words, "greater rate" as contained in the penalty clause refer to a greater rate than is allowed by the laws of the state, and in order to recover it is necessary for plaintiff to allege and prove that a greater rate has been paid. If

the greater rate has not been paid there is no ground or basis for recovery under the section. This fact is the gist of the action. It is the important point to establish. It is the actual wrong that has been done, and the actual loss which the debtor has incurred which furnishes the basis for a suit. It is the only fact upon which a suit can be predicated under this section and is absolutely essential at the very threshold of the case.

The plaintiff claims that excessive and illegal interest was charged by the defendant on his overdrafts between the years 1886 and 1890, without his consent, the excess being created by the bank's custom of charging interest at the full legal rate on overdrafts on the basis of three hundred and sixty days to the year instead of three hundred and sixty-five, with monthly rests.

From time to time the plaintiff made deposits, which were applied to the reduction of this overdraft, but he does not claim that these deposits were applied to the payment of excessive or usurious interest. He does not claim to have paid any money to the defendant since March, 1890, excepting as defendant realized a portion of its judgment through the foreclosure sale of the plaintiff's property.

In order to avoid the statute of limitations the plaintiff claims that the time he actually paid usurious interest was when his property was sold in 1894, under the decree of foreclosure.

On this question of fact as to whether the plaintiff actually paid any excessive interest through the sale of his property on foreclosure, the referee found that he did not, but that, on the contrary, the District Court of Woodbury county, on the foreclosure suit, deducted two thousand six hundred nine

dollars and forty-six cents ($2,609.46), being the full amount of interest charged on the plaintiff's overdrafts, and that, therefore, no interest on overdrafts was computed in the decree. (Record, page 128.)

This finding of fact was confirmed by the District Court. (Record, page 131).

And also by the Supreme Court of Iowa. (Record, page 141).

The decision of the Supreme Court of Iowa rested largely on this proposition. Its conclusions are summed in this sentence: We think the illegal charges of interest have never been paid, and, therefore, the plaintiff is not entitled to recover in this action." (Record, page 141).

This is a question of fact which does not in any way involve the validity, construction or applicability of the section under which the action is brought. It is the primary question of fact upon which the cause of action rests, and cannot be avoided by any argument that illegal interest was charged and reserved, for this will not authorize a recovery unless, as a matter of fact, the illegal interest was actually paid.

McBroom vs. Scottish Investment Co., 153 U. S., 319.

Brown vs. Marion National Bank, 169 U. S., 416.

First National Bank vs. Denson, 22 Southern Rep., 518.

Citizens' Bank vs. Forman, 63 Southwestern Rep., 454.

The next question decided by the Supreme Court of Iowa was that there was a former adjudication inasmuch as this plaintiff had, in the foreclosure suit, set up the charges of illegal interest by way of answer, and had availed himself of the privilege conferred upon him by the statute, and had se-

cured a decree in his favor, deducting all interest upon his overdrafts.

This finding of fact is also in accord with the finding of the distaict court of Woodbury county and the finding of the referee.

This is an independent estoppel not involving any federal question, and accords with the views of this court on the question of former ajudication.

In Western Pacific Railroad vs. United States, 168 U.S., page 48, the court said: "That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination."

The third proposition discussed by the Supreme Court of Iowa was that if there had been a payment of interest prior to the sale of plaintiff's lands under the decree, such, for instance, as by the application of the checks on his overdrafts, or by giving his notes or bonds, that such a payment would not afford ground for a suit because of the statute of limitations; not deciding, however, that the giving of a note could be considered as a payment, or that unapplied checks

on general account would be applied to illegal charges rather than to legal charges.

It was, perhaps, not necessary to decide this question, because the plaintiff has not claimed that either his checks or his notes constituted a payment of illegal interest. He has purposely avoided making this claim to escape the bar of the statute.

Nor could he so claim under the now settled rule of this court that neither unapplied checks or renewal notes can be regarded as a payment under this section of the Revised Statutes.

McBroom vs. Scottish Mortgage Co., 153 U. S. 330.

Brown vs. Marion National Bank, 169 U. S. 419.

This question as to whether the action is barred is also a question of fact not involving in any way the construction or validity of the statutes of the United States. No construction of the statutes is called for by the plaintiff's allegations; all that is necessary is to read it. No facts were alleged to create any exception to this bar, therefore, there is nothing to read into it. Something more than an abstract discussion is necessary to raise a federal question.

If the plaintiff should now claim a payment through his unapplied checks, or his notes or his bonds, and should seek to evade the bar of the statute by alleging ignorance of his cause of action, it would not avail him to evade the bar, for ignorance of a cause of action is no excuse. A person who would avoid the bar must go further and show that his ignorance is caused by the affirmative acts of the guilty party.

Pearsall vs. Smith, 149 U. S. 231-236.

Nowhere in the opinion of the supreme court of Iowa is

the validity, construction, applicability or effect of these sections of the revised statutes called in question.

This court has repeatedly held that to sustain a writ of error from this court, something more must appear than that the parties claim a right under an Act of Congress.

De Lemar's Nevada Co. vs. Nesbitt, 177 U. S. 523-527 and cases cited.

This court has also repeatedly held that in proceedings in this court to review the action of state courts, this court does not enter into consideration of questions of fact, but will accept the determination of the state courts in such matters as conclusive, and inquire simply whether there have been errors of law.

Gardner vs. Bonestell, 180 U. S. 362-370.

This court has also repeatedly held that it is not every case where a federal statute has been construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give jurisdiction to review its judgment.

That a federal statute was construed unfavorably to one of the parties to a suit is no ground of jurisdiction of this court, unless such construction is not only unfavorable but is against the right, etc., specially set up and claimed under the statute.

Kizer vs. Texarkana Railway, 179 U. S. 199-201.

It has also been repeatedly held that where the decision of the state court rests on questions not federal in their character, that this court will not take jurisdiction.

Pittsburg vs. Cleveland,, 178 U. S. 270.

And also that where federal questions were involved, but the decision of the state court could be properly rested on questions not federal in their character, and the federal question was not necessary to the determination of the case, this court could not take jurisdiction.

Johnson vs. Risk, 137 U. S. 300.

Cook County vs. Calumet Co., 138 U. S. 651.

O'Neill vs. Vermont, 144 U. S. 336.

The decision of the Supreme Court of Iowa primarily turned on the question as to whether Talbot ever actually paid any excessive interest.

To ascertain and determine this all important fact, which was the first essential in Talbot's case, it was necessary for the Supreme Court of Iowa to examine the record, and consider each step in the history of the dealings of the parties.

His current deposits from 1886 to 1890 could not be considered a payment of excessive interest, because not so applied, and because neither party so intended.

The giving of renewal notes or personal bonds, which were in fact notes under a different name, has been repeatedly held not to be a payment.

The sale of his property under decree could not work a payment unless excessive interest was computed in and made a part of the judgment and decree, which the Supreme Court of Iowa finds was not done, as a matter of fact.

This finding of fact is conclusive on this Court, and ends the case.

Talbot's grievance, which he tries to state in his assignments of error, is that in the foreclosure suit against him only

the interest on his overdrafts was deducted when he was entitled to areduction of all interest.

In point of fact this claim is incorrect because the trifling items of overcharge on overdrafts was unintentional.

(Record, page 127).

But whether correct or not, it is manifest that this is not the time or the proceeding to secure a reversal of that decree; for it was entered eight years ago, and no appeal was taken. It is, therefore, final and conclusive.

It is evident from the assignments of error, that Talbot now conceives that, as he might have secured a forfeiture of all interest in the foreclosure case, that the inclusion of any interest in that decree was improper and illegal, and if illegal it can be recovered back in this action, regardless of whether the interest collected was in excess of the legal rate.

His conception of the scope of Section 5198, if his position is understood, passes reason and argument, and approaches the ridiculous.

It has not yet been held that a ridiculous and wholly unjustifiable construction of a federal statute would confer jurisdiction.

This section was not enacted as a "drag net" to right all wrongs, real and imaginary, or to afford a basis of recovery for all kinds of grievances, but only affords relief in the one case of actual payment of a greater rate of interest than the laws of the state permit.

Whether such interest has been paid so that the statute can be set in motion, is a question of fact. The validity, effectiveness and applicability of the statute is conceded if Talbot had a right to invoke its aid; but never having paid any excessive interest, he is not in position to discuss its

provisions, or call for its construction. Certainly the supreme court of Iowa has not denied its validity or attempted to place any adverse construction upon it.

Section 5198 affords a choice of remedies, but doesn't mean that a debtor may try one and then the other in the same transaction.

If he elects to try and secure a forfeiture of all interest, and has his day in court, and a determination of his controversy, it is not intended that he may try his case again in an action to collect a penalty.

In the foreclosure case Talbot defended against excessive interest, and was at least partially successful in securing a deduction of all excessive interest.

The supreme court of Iowa have decided that this was an adjudication, and a bar to this suit. They reached this conclusion from an examination of the issues and judgment in the former case.

This then is an independent estoppel not involving the validity, construction or effect of Section 5198, and does not confer jurisdiction upon this court.

II.

If it is held, however, that technically this court has jurisdiction, then it is respectfully submitted that the question presented for re-examination is so clearly without merit as not to need further argument, and that the judgment of the supreme court of Iowa should be affirmed.

Abbott vs. Tacoma Bank of Commerce, 175 U. S. 409-414.

Respectfully submitted,

ASA F. CALL,

Attorney for Defendant.

DEFENDANT'S ARGUMENT.

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In Error to the Supreme Court of the State of Iowa.

ASA F. CALL, SIOUX CITY, IOWA.

Attorney for Defendant.

As this cause has been quite fully stated in defendant's brief on motion to dismiss, it is not restated.

That brief also states most of the propositions on which we rely, and, therefore, these are not reargued at any length.

Plaintiff's right to sue depends entirely upon the Statute.

The general principle governing this case is found in the

fact that the suit is brought under section 5198 of the Revised Statutes for the recovery of a penalty.

The right to sue depends entirely on the statute, for such a right did not and does not exist without it.

It follows, as an elementary proposition, that every condition of the statute must be met or no cause of action arises.

A failure to meet the requirements or conditions of the statute cannot be excused on any ground without creating a cause of action not known to the law, and not contemplated by the statute.

The statute requires the existence of certain conditions before a cause of action is given. These requirements of the statute are,

First. Knowingly charging excessive interest by the lender.

Second. An actual payment of such excessive interest by the borrower.

Third. The commencement of suit to recover within two (2) years from the time the transaction occurred.

Each of these requirements acts as a limitation upon the right, and is a condition precedent to any recovery.

This rule of construction has been laid down by the courts in many analogous cases where new causes of action have been granted by statute.

In the case of The Harrisburg, 119 U. S., 199, on page 214, it is said:

"The statute creates a new legal liability, with the right to "a suit for its enforcement, provided the suit is brought within "twelve (12) months, and not otherwise. The time within

"which the suit must be brought operates as a limitation of the "liability itself as created, and not of the remedy alone. It is a "condition attached to the right to sue at all."

This case is followed in the cases of

Laidlow vs. Oregon Ry., 81 Fed., 879.
Saving Co. vs. Bear Valley Co., 89 Fed., 38.
Davis vs. Railway Co., 53 Ark., 127.
Atchison Ry. vs. Tanner, 19 Colo., 564.
Bartlett vs. Manor, 146 Ind., 627.
Lambert vs. Ensign Co., 42 W. Va., 817.
Williams vs. St. Louis Ry., 123 Mo., 583.
McCartney vs. Tyrer, 94 Va., 203.
Goodwin vs. Cunningham, 54 Neb., 16.

The facts in this case were found by a referee, and such findings, under the Iowa law and practice, have the same force and effect as findings of fact by a jury.

Lyons vs. Harris, 73 Iowa, 294.
Cooley vs. Osborn, 50 Iowa, 531.

The referee found against the Plaintiff on each of the three requirements of the Statute.

On the question as to whether the excessive interest was knowingly charged, the referee found that there was no intention

to charge more than the legal rate of ten per cent. That the error crept in through the methods of the bookkeeper of the bank in using three hundred and sixty days in the year instead of three hundred and sixty-five as a basis of computation, according to the custom of bankers.

(Record, page 127, fifth finding.)

On the question as to whether the plaintiff ever actually paid any excessive interest, the referee found against him, finding that such interest has never in fact been paid; that it was included in an overdraft by mistake, carried into notes and extensions, merged into bonds of the plaintiff, but was expressly excluded from judgment and decree on the foreclosure of those bonds.

(Record, page 128, eighth finding.)

On the question as to whether the suit was brought within two years from the time the usurious transaction occurred, the referee again found against the plaintiff, finding that the usurious transaction occurred more than two years prior to the commencement of this suit.

(Record, page 129, third finding.)

In addition to these three fatal findings, the referee also found that the question had been adjudicated in the foreclosure suit of the bank against the plaintiff

(Record, page 129, fourth finding.)

The Plaintiff's assignments of error do not raise any Federal law question, nor do they raise any law question of any character, but simply attack the findings of fact made by the Referee and affirmed by the Iowa courts.

One error assgned is that in the foreclosure suit of the defendant bank against the plaintiff, the defendant, now plaintiff, did not obtain the full measure of relief to which he was entitled under section 5197 of the Revised Statutes.

He now clams that he should have been entitled to a reduction of all interest on all of his obligations, instead of simply the interest on his overdrafts.

Without discussing the merits of plaintiff's defense in that suit, it is sufficient to say that he failed to appeal from the decree. It passed to final judgment, and it now stands as an unimpeachable adjudication.

It is an elementary proposition that a judgment of a competent court is not open to collateral attack.

Another assignment of error is that there was no adjudication of the present controversy in that foreclosure suit, for the reason that the full measure of relief to which this plaintiff was entitled was not then claimed in his defense.

The plaintiff's answer as defendant in that case is set out in this record, and it appears that the allegation was there made that illegal interest was charged by this defendant, amounting to a large sum, which was included in the notes upon which suit was brought for foreclosure, and a general prayer was made that an accounting be had to the end that a deduction of all overcharges of interest of every kind might be made.

(Record, page 120.)

This plea was certainly broad enough to enable the trial court to grant Talbot all the relief to which he was entitled, and it appears that the trial court not only deducted the trifling amount of overcharge of interest, but went further and deducted over two thousand dollars ($2,000) of interest, being all the interest, both legal and illegal, on his overdrafts.

Under a very familiar rule, the plaintiff is now estopped from again litigating this question.

In a further assignment of error the plaintiff complains of the ruling of the Supreme Court of Iowa in the alleged holding that the statute of limitations commenced to run from the giving of the bonds instead of the date of actual payment of excessive interest.

In this assignment of error the plaintiff errs in his conception both of the facts and of the ruling made. The Supreme Court of Iowa did not hold that excessive interest was paid by the giving of the bonds, but on the contrary did hold that no excessive interest was ever paid.

The suggestion of the court is that if Talbot's claim was correct, that he did pay excessive interest when he gave his bonds, that it was unavailing to him for the reason that such payment would be more than two years prior to the bringing of this suit, and, therefore, barred under the terms of the statute.

The decision of the Supreme Court of Iowa distinctly rests upon the proposition that no excessive interest was ever paid because it was expressly excluded from the judgment and decree of foreclosure, and, up to the time of the sale of the plaintiff's property, no payment had been made.

This finding of fact by the Supreme Court of Iowa is not

only conclusive upon this court but is based on the undisputed evidence.

The testimony of F. R. Gaynor, the judge who tried the case, was taken, and he testified: "It was ordered in making the decree that this excessive interest be deducted from the amount for which judgment should be ultimately entered, and I think it was at that time entered only for the amount that was found due after deducting this excessive interest, or this charge of interest upon overdrafts."

(Record, page 97.)

The testimony of S. M. Marsh, who was Talbot's attorney on that hearing, was also taken. Mr. Marsh also testified that this deduction of interest was made.

(Record, page 99.)

There was no attempt made to dispute this fact. The finding of the referee was based on undisputed evidence.

To avoid the conclusiveness of this finding Talbot urged that he paid the interest at some prior date by the giving of his notes or bonds. The Supreme Court of Iowa answered this theory by saying that even if it were true, his suit was not brought in time. But the court might have answered it in another way by saying that it was not true, for it is now well settled that a payment by notes or bonds, or the extensions of notes or bonds, is not a payment within the meaning of the statute.

This Court holds that the only way to pay a thing is to pay it.

McBroom vs. Scottish Investment Co., 153 U. S., 319.
Brown vs. Marion Natl. Bank, 169 U. S., 416.

In conclusion, we again submit that there is no question of law involved in this case. The questions raised by the plaintiff are simply questions of fact which are not now open to controversy. The findings of fact by the referee and the Iowa courts are conclusive upon this Court.

Respectfully submitted,

ASA F. CALL,
Attorney for Defendant.